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FALLBROOK UNION HIGH SCHOOL DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARY STRUBLE, As Conservator for) CASE NO. 07CV 2328 LAB (cab)
CS,)

Plaintiff/Counterdefendant,)

v.)

**FALLBROOK UNION HIGH
SCHOOL DISTRICT OPPOSITION
TO MOTION TO SUPPLEMENT
THE ADMINISTRATIVE RECORD**

FALLBROOK UNION HIGH
SCHOOL DISTRICT, a Local
Educational Agency,)

Defendant/Counterclaimant.)

Defendant FALLBROOK UNION HIGH SCHOOL DISTRICT ("District")
hereby opposes the motion of Plaintiff MARY STRUBLE ("Plaintiff") dated May 1,
2008, to supplement the administrative record of the due process hearing of C.S.

I

PROCEDURAL HISTORY

C.S. ("Student") is an individual with exceptional needs and a District student.

1 See Educ. Code § 56026 (defining “individuals with exceptional needs”).

2 On September 4, 2007, Student filed a request for a special education due
3 process hearing with the California Office of Administrative Hearings (“OAH”)
4 pursuant to 20 U.S.C. § 1415(f) and Educ. Code § 56501 *et seq.*

6 A hearing on Student’s special education due process hearing was heard by an
7 OAH administrative law judge (“ALJ”) on October 16-19, 2007, and on November
8 20, 2007, a decision in the hearing was rendered.

10 The matter before this Court is a civil action filed by Plaintiff on behalf of her
11 conserved son, Student, appealing, pursuant to 20 U.S.C. § 1415(i)(2)(A), the
12 decision rendered in Student’s due process hearing.

14 On or about May 1, 2008, Plaintiff filed with this Court a Notice of Motion
15 and Motion to Supplement the Administrative Record (“Motion”), a Memorandum
16 of Points and Authorities in Support of Plaintiff’s Motion to Supplement the
17 Administrative Record (“Points and Authorities”), and a Declaration of Ellen Dowd,
18 Esq. in Support of Motion to Supplement Administrative Record (“Declaration”).

21 Plaintiff also lodged with this Court the documents with which she proposes to
22 supplement the administrative record.

23 II

24 PLAINTIFF’S MOTION

26 Plaintiff moves to supplement the administrative record with the following
27 documents:
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- a. A letter from the District Special Education Director to Student's parents dated January 3, 2008, regarding further requirements that Student must fulfill in order to obtain a high school diploma, including information pertaining to courses and the California High School Exit Exam ("CAHSEE"), with enclosed course outlines for English 9, 11, and 12, Algebra 1, and Informal Geometry. [Exhibit A.]
- b. A memorandum from Training Education Research Institute dated November 28, 2007, regarding "C[.] S[.], *i.e.*, Student]" and stating that "the classes that are listed on the transcript for 2003-04 were completed in a Functional Skills Program" and that "these classes would not meet the requirements for a high school diploma." [Exhibit A.]
- c. Cover sheet for 26 pages faxed from Student's parents to their attorney on January 7, 2008. [Exhibit A.]
- d. Undated letter from Fusion Learning Center ("Fusion") to the attorney for Plaintiff regarding Student's possible attendance at Fusion. [Exhibit B.]
- e. District transcript for Student through spring 2007. [Exhibit C.]
- f. Printout of an email from Brenda Hodges to the District Special Education Director sent on November 26, 2007, regarding courses Student must still successfully complete in order to obtain a high school diploma. [Exhibit C.]

- g. Draft copy of Student's Individualized Education Program ("IEP") dated February 7, 2008. [Exhibit D.]
- h. Letter from Fusion to Plaintiff's attorney dated April 15, 2008, regarding courses that Student must successfully complete in order to obtain a high school diploma and a proposed schedule of Fusion courses. [Exhibit E.]
- i. Fusion Enrollment Contract for Student's enrollment date of April 1, 2008. [Exhibit F.]
- j. Billing statement from Fusion to Student's parents for charges due by May 26, 2008, with payment receipt. [Exhibit G.]
- k. Bank copy of check from Student's parents to Fusion for \$3,120.00. [Exhibit G.]
- l. Billing statement from Fusion to Student's parents for charges due by May 26, 2008. [Exhibit H.]
- m. Fusion update on Student dated May 1, 2008.
- n. Billing statement from Fusion to Student's parents for May 2008 charges. [Exhibit I.]

Plaintiff moves to supplement the administrative record on the grounds that the documents were generated subsequent to issuance of the Decision in Student's due process hearing and are relevant to the determination of the compensatory education award. (Points and Authorities, 2:6-9, 2:16-17.)

1 Plaintiff also asserts that, as Student's education is ongoing, further documents
2 similar to the foregoing should continue to be received until the briefing in this case
3 begins. (Points and Authorities, 2:26-28.)
4

5 Plaintiff does not assert in the Motion, Points and Authorities, or Declaration
6 that there are gaps in the administrative record, that witnesses were unavailable for
7 Student's due process hearing, that the ALJ improperly excluded evidence at the
8 hearing, or that the information contained in each of the documents could not have,
9 by due diligence, been discovered in time for Student's due process hearing.
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11 III

12 DISTRICT'S OPPOSITION TO PLAINTIFF'S 13 MOTION AND POINTS AND AUTHORITIES 14

15 The District opposes Plaintiff's Motion on grounds that (a) the documents are
16 not relevant to the issues before this Court, (b) Plaintiff has failed to exhaust her
17 administrative remedies, (c) the information in the documents was available to
18 Plaintiff at the time of Student's due process hearing, (c) supplementing the
19 administrative record with the documents would convert this proceeding into a trial
20 *de novo*, (e) the documents do not pertain to subsequent events, (f) the documents
21 have not been authenticated or identified, (g) Plaintiff has no right to supplement the
22 record on an ongoing basis until the briefing in this case begins.
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26 *a. The documents are not relevant to the issues before this Court.*

27 Plaintiff's Complaint/Appeal of Office of Administrative Hearings, Special
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1 Education Division for Partial Reversal of Decision and Attorney Fees and Costs
2 (“Complaint”) dated December 13, 2007, states that the gravamen of Student’s
3 request for a special education due process hearing was that the District failed to
4 inform Plaintiff and Student of options for graduation and at a June 2007 IEP team
5 meeting, the District only offered a predetermined placement in the District’s
6 Transition Program where he could not earn a high school diploma. (Complaint,
7 3:27-4:3.)
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10 The Decision of the ALJ found that the District failed to adequately
11 communicate to Plaintiff that Student was on a non-diploma curricular track and
12 failed to discuss options/predetermined placement at the June 2007 IEP team
13 meeting. (Decision, pp. 13-14, ¶¶ 53-54.)
14

15 On the basis of those findings, the ALJ ordered the District to schedule a new
16 IEP team meeting within 30 days of issuance of the Decision and to discuss and
17 consider placements, including nonpublic school placements, goals, and services
18 designed to help Student work toward a high school diploma. (Decision, “Order,” p.
19 37.)
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21

22 Plaintiff complains that the ALJ violated the law by ordering as a remedy that
23 the District convene an IEP team meeting to discuss and consider placements, goals,
24 and services designed to help Student work toward a high school diploma.
25 (Complaint, 5:8-6:8; *but see Sykes v. District of Columbia*, 518 F.Supp.2d 261, 264
26 (D.D.C. 2007) (noting that the hearing officer directed the IEP team to discuss
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1 placement and education program after ordered evaluations had been conducted).)

2 Plaintiff additionally complains that the ALJ should not have decided all
3 issues put before her by Student but only the issues of whether the District
4 adequately communicated to Student's parents that Student was on a non-diploma
5 curricular track and whether the District discussed options and considered placement
6 at the June 2007 IEP team meeting. (Complaint, 4:12-5:7; *see also* Decision, pp. 2-
7 3, "Issues.")
8
9

10 Plaintiff complains no further.

11 Information pertaining to Fusion and the February 7, 2008 IEP team meeting
12 are not relevant to the determination of whether the ALJ violated the law by ordering
13 the District to convene an IEP team meeting or whether the ALJ should have decided
14 all issues put before her by Student. *See, e.g., S.M. v. Board of Education*, 455
15 F.Supp.2d 1286, 1303 (S.N.M. 2006) (applying the harmless error rule to exclude
16 additional evidence propounded by a party who was awarded adequate equitable
17 relief on the issue that the party was appealing); Fed. R. Evid. 401 (defining
18 "relevant evidence"); Fed. R. Evid. 402 (excluding from admissibility that evidence
19 which is not relevant).
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23 ***b. Plaintiff has failed to exhaust her administrative remedies.***
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25 Exhaustion of remedies is required under the Individuals with Disabilities
26 Education Act ("IDEA"). *See, e.g.,* 20 U.S.C. § 1415(i)(2) (requiring a due process
27 hearing as a condition precedent for filing a civil action in district court); *Honig v.*
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1 *Doe*, 484 U.S. 305, 326-27, 108 S.Ct. 592 (1988) (recognizing that the Education of
2 the Handicapped Act, predecessor to the IDEA, requires exhaustion); *Hoelt v.*
3 *Tucson Unified School District*, 967 F.2d 1298, 1303 (9th Cir. 1992) (explaining the
4 policies that underlie the IDEA's exhaustion doctrine); *see also* 20 U.S.C. § 1415(l)
5 (requiring that a request for due process be filed as a condition precedent to filing a
6 civil action in district court alleging violations of other federal law that is also
7 cognizable under the IDEA).

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10 Plaintiff alleges that the District violated the IDEA subsequent to Student's
11 due process hearing by not considering the continuum of alternative placement
12 options at Student's February 7, 2008 IEP team meeting and moves to introduce
13 evidence of the violation with documents pertaining to Fusion and the IEP team
14 meeting. *See* Points and Authorities, 2: 4-9; Declaration, 2:8-14; *see also* 34 C.F.R.
15 § 300.115 (requiring that school districts provide a continuum of alternative
16 placements to meet the needs of children with disabilities in the least restrictive
17 environment).

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21 Plaintiff is required to file for a due process hearing on behalf of Student on
22 this claim before bringing the claim to this Court. 20 U.S.C. § 1415(i)(2). Plaintiff
23 has not allowed the OAH to apply its expertise and explore the issues raised by the
24 claim, no administrative record has been developed on the claim, and Plaintiff has
25 not afforded the District the opportunity to mediate the claim. *See* 20 U.S.C. §
26 1415(e) (requiring participating states to have in place procedures that allow parties
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1 to due process complaints to resolve the disputes through a mediation process).

2 As the Ninth Circuit explained in *Hoelt v. Tucson Unified School District*, 967
3 F.2d 1298 (9th Cir. 1992):

4 “Exhaustion of the administrative process allows for the exercise of discretion
5 and educational expertise by state and local agencies, affords full exploration
6 of technical educational issues, furthers development of a complete factual
7 record, and promotes judicial efficiency by giving these agencies the first
8 opportunity to correct shortcomings in their educational programs for disabled
9 children.” *Hoelt*, 967 F.2d at 1303.

10 The hearing officer correctly noted the correct procedure following the IEP
11 meeting ordered in the Decision, as follows:

12 “If the IEP team is unable to agree upon an appropriate placement, nothing in
13 this Decision would stop either party from seeking further relief through a
14 future due process proceeding.

15 * * *

16 “Nothing in this decision is intended to prevent either party from filing a
17 further due process proceeding regarding any proposal made at that IEP
18 meeting”.

19 Decision, “Conclusions of Law,” p. 37, ¶ 33, “Order,” p. 37, ¶ 3.

20 ***c. The information was available at the time of the due process hearing.***

21 Plaintiff moves to introduce documents pertaining to requirements that
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1 Student must fulfill in order to obtain a high school diploma and Fusion services and
2 costs.

3 Although the District disputes Plaintiff's assertion that she did not learn that
4 Student was not on a diploma-bound track until June 2007, nevertheless, even in
5 accepting Plaintiff's assertion, it is evident that Plaintiff had ample opportunity to
6 determine the requirements that Student must fulfill in order to obtain a high school
7 diploma prior to Student's due process hearing. Furthermore, and according to
8 Plaintiff, she had the motivation to determine the requirements because she asserts
9 she had been under the impression that Student was on a diploma-bound track,
10 learned in June 2007 that Student was not on a diploma-bound track, and wanted
11 Student to be diploma-bound.

12 Student continues to be a student of the District because he is an individual
13 with exceptional needs, Student has yet to obtain a high school diploma, and his
14 parents maintain residency within the District. *See* Educ. Code § 56026(c)(3)
15 (including as individuals with exceptional needs those students who are 18 years of
16 age); Educ. Code § 56026.1 (excluding from special education eligibility those
17 individuals with exceptional needs who have obtained a high school diploma); Educ.
18 Code § 48200 (compulsory education law requiring students to attend the school
19 district in which the residency of the parent is located); Complaint at 2:14-15
20 ("Plaintiff and Student reside within the jurisdictional boundaries of Fallbrook Union
21 High School District"); *see also* Educ. Code 56026(c)(4) (including as individuals
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1 with exceptional needs those students who are between the ages of 19 and 21 years,
2 inclusive, who are eligible for special education and who have not completed
3 prescribed courses of study, have not met proficiency standards, or have not
4 obtained a high school diploma).

5
6 Student's hearing on his due process complaint began on October 16, 2007.
7 (Decision, p. 1.) At the time of the hearing, Student was still a District student.

8
9 Plaintiff had ample time, ability, and opportunity to obtain from the District
10 information pertaining to the requirements that Student must fulfill in order to obtain
11 a high school diploma. *See, e.g.*, Educ. Code § 56505(e)(7) (providing that a party to
12 a due process hearing must provide the other parties to the matter with a copy of all
13 documents that the party intends to introduce into evidence at least five business
14 days prior to hearing); Educ. Code § 49600 (providing for school districts to
15 implement comprehensive educational counseling programs); *Richard H. v.*
16 *Kennewick School District No. 17*, 82 F.Supp.2d 1174, 1179 (E.D. Wash. 2000)
17 (holding that the requesting party bears the threshold burden of demonstrating, at the
18 time of the request, that the supplemental evidence should be admitted because the
19 requesting party could not have, by due diligence, discovered the evidence in time).

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21 Similarly, Petitioner had ample time, ability, and opportunity to obtain
22 information pertaining to Fusion services and costs prior to hearing. *See* Decision,
23 "Factual Findings," p. 30, ¶ 156, "Conclusions of Law, p. 36, ¶ 31 (finding of fact
24 and conclusion of law officer that Fusion is not a state-certified nonpublic school and
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1 noting that Student presented evidence related to Fusion and the services that it
2 provides.)

3 The District notes that Plaintiff does not assert that information pertaining to
4 the requirements that Student must fulfill in order to obtain a high school diploma
5 and Fusion services and costs was unavailable to her at the time of the hearing.
6 Instead, Plaintiff asserts that documents pertaining to high school diploma
7 requirements and Fusion costs and services were not in existence at the time of
8 Student's due process hearing and were generated subsequent to the Decision.
9 (Motion, 1:23-26; Points and Authorities, 2:16-17.)

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11 ***d. Supplementing the administrative record would convert this proceeding***
12 ***into a trial de novo.***

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14 In any action brought as a civil action and appeal of a due process hearing
15 pursuant to 20 U.S.C. § 1415(i)(2)(A), the court shall receive the records of the
16 administrative proceedings, shall hear additional evidence at the request of the party,
17 and basing its decision on the preponderance of the evidence, shall grant such relief
18 as the court determines is appropriate. 20 U.S.C. § 1415(i)(2)(C).

19
20 Due weight shall be given to the administrative proceedings. *Capistrano*
21 *Unified School District. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995); *Board of*
22 *Education v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).
23 The deference to be given is the discretion of the Court. *Capistrano*, 59 F.3d at 891;
24 *Gregory K. v. Longview School District*, 811 F.2d 1307, 1311 (9th Cir. 1987). The
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1 Court is to consider the findings carefully and endeavor to respond to the hearing
2 officer's resolution of each material issue, but the court is free to accept or reject the
3 findings in part or in whole. *Capistrano*, 59 F.3d at 891; *Gregory K.*, 811 F.2d at
4 1311.
5

6 Additional evidence may be heard by this Court to supplement the
7 administrative record because of gaps in the administrative transcript, unavailability
8 of a witness, improper exclusion of evidence by the ALJ, and evidence concerning
9 relevant events occurring subsequent to the due process hearing. *Ojai Unified*
10 *School District v. Jackson*, 4 F.3d 1467, 1472-73 (9th. Cir. 1993) (quoting *Town of*
11 *Burlington v. Department of Education*, 736 F.2d 773, 790-91 (1st Cir. 1984)).
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14 However, the Court must be careful that it does not change the nature of the
15 proceedings from one of review to that of a trial *de novo*. *Id.* at 1473 (quoting *Town*
16 *of Burlington*, 736 F.2d at .791).
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18 Plaintiff's attorney asserts that (1) at the IEP team meeting convened pursuant
19 to the ALJ Decision and order, the only placement offer considered by the entire IEP
20 team was Fallbrook High School, the majority of time spent during the meeting was
21 discussing how Student would pass the CAHSEE, and Fusion had prepared a written
22 statement to be shared at the meeting, and (2) Student started a trial period of
23 attendance at Fusion where he allegedly progressed academically and socially, and
24 has been accepted at Fusion for May 2008. (Declaration, 2:8-21.)
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27 Plaintiff asserts that documents pertaining to the IEP team meeting and Fusion
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1 should be “heard” by this Court, although Plaintiff asserts that she is not seeking to
2 reopen the record for witness testimony. (Points and Authorities, 2:16.)

3 However, assuming, *arguendo*, that the documents pertaining to Fusion and
4 the February 7, 2008 IEP team meeting are relevant, the District disputes Plaintiff’s
5 attorney’s characterization of the February 7, 2008 IEP team meeting and has not
6 had an opportunity to examine Fusion staff under oath about assertions that are made
7 in the Fusion documents. *See A.S. v. Trumbull Board of Education*, 414 F.Supp.2d
8 152, 171-72 (D.Conn. 2006) (denying request to supplement the record, in part,
9 because in order to otherwise ensure a sufficiently balanced record, the court would
10 have to extend discovery to the opposing part to access relevant records, depose
11 witnesses, and take trial testimony).

12 To afford the District the opportunity to balance the record in this matter
13 would turn this proceeding into a trial *de novo*. *See Ojai Unified School District*, 4
14 F.3d at 1473.

15 ***e. The documents do not pertain to subsequent events.***

16 Plaintiff does not assert in her Motion that there are gaps in the administrative
17 record, that witnesses were unavailable for Student’s due process hearing, or that the
18 ALJ improperly excluded evidence at the hearing. *See Ojai Unified School District*,
19 4. F.3d at 1473.

20 The only “events” that have occurred subsequent to Student’s due process
21 hearing which Plaintiff asserts are relevant to her Complaint is convening the
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1 February 7, 2008 IEP team meeting and Student's matriculation at Fusion in April
2 2008.

3 Requirements for obtaining a high school diploma or Fusion services and costs
4 are not "events" that occurred after Student's due process hearing. That information
5 was available to Plaintiff prior to Student's due process hearing and Plaintiff makes
6 no assertion to the contrary. In addition, Plaintiff does not assert that the ALJ
7 improperly excluded information pertaining to requirements for obtaining a high
8 school diploma or Fusion services or costs.
9

10
11 ***f. The documents have not been authenticated or identified.***
12

13 Plaintiff has not authenticated or identified the documents pertaining to Fusion
14 to this Court or to the District. *See* Fed. R. Evid. 901 (requiring authentication or
15 identification as a condition precedent to admissibility).
16

17 The Fusion documents are not, therefore, admissible.

18 ***g. Plaintiff has no right to supplement the record on an ongoing basis until***
19 ***the briefing in this case begins.***
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21 Plaintiff has provided no legal authority for her assertion that she has a right to
22 supplement the record on an ongoing basis until the briefing in this case begins, or
23 that she has *carte blanche* to introduce further documents if this Court determines
24 that any previous documents shall be allowed to supplement the record.
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26 Plaintiff's assertion is contrary to law, which requires that for any document to
27 be allowed to supplement the record it must be reviewed by the court to determine
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1 (1) its admissibility, (2) whether introduction of the document would turn the court
2 proceeding into a trial *de novo*, (3) whether the party propounding the document has
3 exhausted administrative remedies, and (4) whether the party could have obtained
4 the information contained in the document prior to the due process hearing.
5

6 **IV**

7 **CONCLUSION**

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9 For the foregoing reasons, the District respectfully requests that this Court
10 deny Plaintiff's Motion to supplement the administrative record.

11 Dated: May 9, 2008.

Respectfully Submitted,

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13 FILARSKY & WATT LLP

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15 By: s/Sharon A. Watt

16 SHARON A. WATT

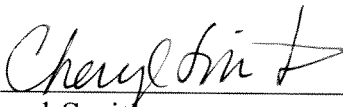
17 Attorney for Defendant and Counterclaimant
18 FALLBROOK UNION HIGH SCHOOL
DISTRICT

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I am employed in the County of Ventura, State of California and that I am over the age of 18 years and am not a party to this action. My business address is 408 Bryant Circle, Suite C, Ojai, California 93023.

On the date noted below, I served the foregoing document described as **FALLBROOK UNION HIGH SCHOOL DISTRICT OPPOSITION TO MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD** by serving counsel of record, Ellen Dowd, Esq., electronically, having verified on the Court's CM/ECF website that such counsel is listed to receive email notification for this case and that there are no other attorneys on the manual notice list.

Dated: May 9, 2008


Cheryl Smith